AND BRIEF

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No. 15-797

IN THE
Supreme Court of the United States

BOBBY JAMES MOORE,
Petitioner,

v.

TEXAS,
Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

The State's opposition confirms the need for this Court to review two pressing questions: (i) whether the Eighth Amendment requires consideration of current medical standards in assessing intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Hall v. Florida*, 134 S. Ct. 1986 (2014), and (ii) whether an individual may be executed after an excessively long period of confinement (thirty-five years) under sentence of death, almost half of which has been served—and continues to be served—in solitary confinement.

As the Petition explained, Pet. 12-26, Texas's sweeping rejection of current medical standards for assessing intellectual disability violates this Court's Eighth Amendment jurisprudence. The state habeas trial court determined that Petitioner is intellectually disabled under current medical standards. But the Texas Court of Criminal Appeals ("CCA") held that the lower court "erred" in applying current medical standards, and should instead have applied only Texas's decade-old decision relying on a more-than-two-decades-old superseded medical standard. App. 6a.

Texas's primary argument is that review is unnecessary because States need not follow "any particular methodology"—*including, specifically, current medical standards*—in "assessing claims of intellectual disability." Opp'n 11. This position is far-reaching and deeply wrong. As this Court recently emphasized, a legal determination of intellectual disability must be "informed by the medical community's diagnostic framework," and should not "disregard[] established medical practice." *Hall*, 134 S. Ct. at 1995, 2000. For this reason, every state

high court to consider the issue since *Hall* (in stark conflict with the CCA) has agreed that courts should be guided by current, established medical standards in assessing intellectual disability. The CCA squarely rejected and precluded the use of current medical standards in the Eighth Amendment inquiry mandated by this Court. That crisp legal issue—on which state high courts disagree—urgently warrants this Court's review.

The Court also should review Moore's claim that executing him after prolonged confinement on death row would violate the Eighth Amendment. Texas responds mechanically to Moore's claim, tersely deriding it as "frivolous." But, as Moore explained, Pet. 26-34, significant authority—reflected in the views of three Justices—suggests that executing an inmate after lengthy imprisonment under sentence of death is cruel and unusual. And a fourth Justice has emphasized the harms caused by prolonged periods of solitary confinement. *Id.* at 30. This Petition presents an especially compelling vehicle for this fundamental constitutional issue. Moore has been imprisoned on death row for a longer period (thirty-five years) than in any cited case. And he has spent the last fifteen years deprived of human interaction, alone in his cell 22.5 hours per day. There is an urgent need for this Court to consider whether the dehumanizing conditions of Moore's confinement violate the Eighth Amendment's prohibition on cruel and unusual punishment.[1]

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[1] Texas's rendition of the facts, Opp'n 3-4, does not undermine the need for review of the legal issues presented; it also conspicuously omits certain facts. *See, e.g., Moore v. Johnson*,

I. The Questions Presented Are Properly Before This Court And Warrant Review Without Delay.

Texas attempts to evade review by suggesting a supposed vehicle problem—that review is unnecessary at this juncture "because Moore has yet to seek federal habeas corpus relief." Opp'n 8. The State's attempt to deflect this Court's consideration is unavailing.

"This Court, of course, has jurisdiction over the final judgments of state postconviction courts, and exercises that jurisdiction in appropriate circumstances." *Wearry v. Cain*, 577 U.S. ___ (2016), slip op. 10-11. There is nothing unusual about this Court exercising jurisdiction to review state collateral proceedings. Already this Term, the Court has reversed state collateral courts twice, *id.* (reversing state habeas court's decision upholding capital conviction); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and has heard argument in another case reviewing such proceedings, *Foster v. Chatman*, No. 14-8349.

This Court has recognized that capital cases present particularly appropriate circumstances for the Court's prompt review: "The alternative to granting review . . . is forcing [petitioner] to endure yet more time on [] death row" due to constitutional error. *Wearry*, slip op. 11; *see also, e.g.*, *Sears v. Upton*, 561 U.S. 945, 956 (2010) (vacating capital sentence upheld in state habeas review and remanding for determination under correct legal standard); *Deck v.*

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194 F.3d 586, 593 (5th Cir. 1999) (referring to "exculpatory evidence that [Moore's] offense was accidental").

Missouri, 544 U.S. 622, 624 (2007) (reversing state habeas court's decision which had upheld capital sentence). Indeed, that was the precise procedural posture in *Hall v. Florida* itself. 134 S. Ct. at 1992.[2]

The State next contends that review is inappropriate because "the state habeas proceeding generated facts too plentiful to be given full review in the limited context of a petition for writ of certiorari." Opp'n 9. This argument also falls flat. The Questions Presented in this case raise threshold legal issues. The intellectual disability issue presents a fundamental question about the appropriate lens for evaluating the relevant evidence. The CCA applied an egregiously flawed framework for the Eighth Amendment inquiry—that it is forbidden for a court to follow current medical standards. That fundamental legal error, which infects the CCA's entire analysis and its evaluation of the record, merits this Court's consideration.[3] In any event, even "fact-intensive" questions provide no reason for this Court to delay review in the capital context. *Wearry*, slip op. 9-10.

Given the urgent and important questions of law raised in the Petition, there is no reason to "forc[e Moore] to endure yet more time on [Texas's] death

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[2] Texas's reliance on Justice Stevens's concurrence in *Kyles v. Whitley*, 498 U.S. 931, 932 (1990), Opp'n 8, is misplaced. That opinion predated the Anti-Terrorism and Effective Death Penalty Act, which dramatically changed the scope and tenor of federal habeas review.

[3] For this reason, Texas's suggestion that review is unwarranted because the CCA stated that the trial court misinterpreted the evidence, Opp'n 7, likewise is unavailing: in considering the evidence, the CCA applied the wrong standard and framework based on its threshold legal error.

row in service of" his "constitutionally flawed" sentence. *Id.* at 11. The procedural posture of this case presents no obstacle to this Court's immediate review.

II. This Court Should Determine Whether The Eighth Amendment Permits A State To Reject Current Medical Standards.

The CCA ruled below that the state habeas court "***erred*** by employing the definition of intellectual disability presently used by the [medical community]." App. 6a (emphasis added). Defending the CCA, Texas explicitly maintains that the Eighth Amendment does not "bar[] the execution of a prisoner who is deemed to be intellectually disabled under the most current medical standards." Opp'n 9.

The CCA's repudiation of current medical standards squarely conflicts with every state high court that has considered the issue since *Hall*. In a decision issued two days after this petition was filed, the Florida Supreme Court held that, "[b]ased on further direction . . . in *Hall*, reaffirmed in *Brumfield*, courts must be guided by established medical practice and psychiatric and professional studies that elaborate on the purpose and meaning of each of the three prongs for determining an intellectual disability. . . . [I]n determining the definition of an intellectual disability, the informed assessments of medical experts cannot be disregarded." *Oats v. Florida*, 181 So. 3d 457, 460 (Fla. 2015). Moreover, as explained in the Petition, Pet. 17-18, and in sharp conflict with the CCA, the Oregon and Mississippi Supreme Courts likewise have determined that the Eighth Amendment intellectual disability inquiry requires consideration of current, established medical standards. *See Oregon v.*

Agee, 358 Or. 325, 350, 353-54 (2015) (trial court must apply "now-current medical standards" in assessing intellectual disability); *Chase v. Mississippi*, 171 So. 3d 463, 471 (Miss. 2015) (in light of *Hall* and *Atkins*, recognizing and adopting "new definitions of intellectual disability that are generally accepted in the medical community"). Texas does not even address these decisions cited in the Petition, or explain how their constitutional holdings are consistent with the CCA's across-the-board rejection of current medical standards. It simply ignores them.

The consensus of every state high court to consider the issue since *Hall*—except the CCA here—is amply supported and compelled by this Court's decisions. While the Court undoubtedly "'le[ft] to the States the task of developing ***appropriate ways*** to enforce the constitutional restriction,'" *Atkins*, 536 U.S. at 317 (emphasis added), it did not give the States unfettered discretion. To the contrary, as the Court explained in *Hall*, "[i]f the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." 134 S. Ct. at 1999. As numerous state and federal courts have held, Pet. 18-19, States are not free to reject current, established medical standards and adopt either outdated and superseded medical standards or standards completely untethered to current clinical consensus.[4]

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[4] Texas attempts to dismiss the Petition as advocating for "tak[ing] the legal decision of whether a defendant is intellectually disabled out of the hands of the factfinder and plac[ing] it in the hands of medical professionals." Opp'n 10. The Petition

Texas also erroneously suggests that it makes no difference that the CCA rejected and flatly forbade the use of current medical standards. The State claims that the CCA's approach, which instead applies decades-old abandoned standards and includes non-clinical factors, is consistent with the current medical diagnostic framework. But the CCA explicitly rejected the trial court's intellectual-disability determination precisely because the trial court relied on current medical standards—a fundamental, threshold issue. And the CCA then determined that Moore was not intellectually disabled under its outdated and non-clinical standards. As Moore's case demonstrates, and as the Petition, the amicus brief of the American Academy of Psychiatry and the Law, and decisions from other courts explicate, the difference between using superseded standards and current medical standards is often outcome-determinative. *See, e.g.*, Pet. 19-26 (explaining the decisive impact of the difference in this case); Amicus Br. of American Academy of Psychiatry & the Law *et al.*, 18-24 (emphasizing the "life-or-death" impact of applying current intellectual disability standards, including in this case); *Agee*, 358 Or. at 353-54 (remanding for consideration of current medical

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advances no such position. As other state high courts have recognized, courts must make their own legal determinations on intellectual disability, but those decisions must consider the medical community's current medical standards. *See Agee*, 358 Or. at 354 (remanding for new *Atkins* hearing "in which the trial court shall consider the evidence presented in light of the standards set out in the DSM-5 and discussed in *Hall*"); *Oats*, 181 So. 3d at 460 (remanding for intellectual disability determination "guided by established medical practice and psychiatric and professional studies").

standards because difference could be dispositive on life or death).[5]

In sum, Texas's suggestion that it makes no difference whether current medical standards are used is belied by the CCA's linchpin holding that the trial court "erred" in its use of current medical standards; by the record and evidence in this case; by established medical consensus; and by the decisions of other courts.[6]

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[5] Instead of responding to the explanations in the Petition and the American Academy of Psychiatry amicus brief of the life-or-death consequences regarding the failure to apply current medical standards in this case, Texas defends the CCA's use of its "*Briseno* factors" to assess adaptive deficits. Opp'n 15-19 (citing *Ex Parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004)). As noted in the Petition, Pet. 25 n.9, use of those outdated and non-clinical factors has been heavily criticized. *See also Smith v. Ryan*, ---F.3d---, 2016 WL 454337, at *12 n.18 (9th Cir. Feb. 4, 2016) ("a national consensus" of states now forbids the use of a non-clinical definition of adaptive deficits).

[6] Texas's contention that "*Hall* 'exclusively addresses the constitutionality of mandatory, strict IQ test cutoffs,'" Opp'n 14, conflicts with other courts. *See, e.g.*, *Oats*, 181 So. 3d at 470-71; *Agee*, 358 Or. at 354; *Smith*, ---F.3d---, 2016 WL 454337, at *12 n.18 ("the Supreme Court held in *Hall* that states must comply with elements of the clinical definition [of intellectual disability] about which there exists a national consensus"; noting that Arizona's "restrictive" and non-clinical definition of adaptive deficits "may well be violative of the rules established in *Hall*, and unconstitutional").

III. This Court Should Consider Whether Moore's Extraordinarily Long Confinement Under A Death Sentence Violates The Eighth Amendment.

The State does not meaningfully challenge the merits of Moore's Eighth Amendment claim based on his prolonged confinement under sentence of death. It does not dispute that Moore has been confined under threat of death for over thirty-five years—a longer period than in any other cited claim. Pet. 8. It does not dispute that, for nearly half that time, Moore has been held in highly isolated "administrative segregation," *id.* at 8-9 & 9 n.4—a "regime that will bring you to the edge of madness, perhaps to madness itself," *Davis v. Ayala*, 135 S. Ct. 2187, 2209-10 (2015) (Kennedy, J., concurring). Or that the State's setting of two execution dates for Moore, Pet. 8, has only "sharpened" "[d]eath row's inevitable anxieties and uncertainties," *Foster v. Florida*, 537 U.S. 990, 990 (2002) (Breyer, J., dissenting from denial of certiorari). Nor does Texas contest that views at the Founding, and this Court's precedent, support Moore's claim that execution after such prolonged confinement is cruel and unusual. Pet. 28-29.

Texas also does not dispute that executing a person after such lengthy confinement furthers none of the "social purposes" served by the death penalty and therefore is "nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment." *See Enmund v. Florida*, 458 U.S. 782, 798 (1982); Pet. 31-33. Finally, Texas has no answer to the fact that the United States stands as an obvious outlier amid the "[c]lear consensus" of international authorities that execution after prolonged death-row detention is cruel and un-

usual. *See* Amicus Br. of Int'l Law & Human Rights Societies, Practitioners & Scholars [hereafter "Int'l Law Br."] 2, 14-24.

Instead, Texas points only to three perfunctory arguments in opposition to the urgent need for this Court to clarify whether the Eighth Amendment permits execution of a person who has languished on death row, in highly isolated confinement, for three-and-a-half decades. None has merit.

First, Texas criticizes Moore for "[r]elying heavily on the numerous dissenting opinions written by Justice Breyer on the issue." Opp'n 20. But this gives short shrift to the weighty underpinnings of Moore's argument. As a threshold matter, Moore relies on the consistent urgings of two Justices (Justices Breyer and Stevens) to review the issue, Pet. 27 n.10, and the recent reservations expressed by a third Justice (Justice Ginsburg) about the execution of persons after a long period of confinement, *id.* (citing *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., joined by Ginsburg, J., dissenting)). Moore also highlights the profound concerns of a fourth Justice (Justice Kennedy) about prolonged periods of solitary confinement. Pet. 30 (discussing *Davis*, 135 S. Ct. at 2209-10 (Kennedy, J., concurring)). Surely the views of at least four Justices cannot be dismissed as "frivolous." Opp'n 25. Moore also supports his claim with case law from this Court; views at the Founding; the English Declaration of Rights of 1689; international law; and an analysis of penological justification. Pet. 28-33.

Second, citing the denial of certiorari in previous cases, Texas maintains that "[t]he Court should decline the invitation for the same reasons it has

repeatedly done so in the past." Opp'n 20 & n.10. Of course, this Court's denial of petitions presenting even identical issues says nothing of the merits of this Petition. Indeed, this Court recently granted certiorari in *Riegel v. Medtronic, Inc.*, 551 U.S. 1144 (2007), even though it had denied petitions raising identical issues five times in the previous six years. *See Riegel*, Opp'n Br., 2006 WL 2849233, at *1. The urgent need to review this issue has heightened in recent years, in light of the increase in the average period of an inmate's confinement before execution, Pet. 27, and the burgeoning international consensus that execution of a person after such prolonged confinement is cruel and unusual, Int'l Law Br. 2, 14-24.

Most fundamentally, review is warranted given the compelling nature of Moore's claim. Moore presents a constellation of factors not found in any case cited by Texas that strongly favor this Court's consideration: he has been confined under sentence of death for a longer period than in any cited case; he currently is held in highly isolated confinement, where he has remained for nearly the last fifteen years; he has endured the signing of two separate death warrants during his confinement on death row; and for virtually all of his thirty-five years on death row, he has been fighting to vindicate his constitutional rights, prevailing in one proceeding and winning in the state habeas trial court in another.

Third, Texas contends that Moore's prolonged confinement is a "result of the inmate's own making, having availed himself of the right to direct appeal and to seek collateral relief." Opp'n 22. Not so. Almost the entirety of Moore's confinement (at least thirty-two of the thirty-five years) has been spent raising—and largely vindicating—constitutional

claims to ensure that his conviction and sentence comport with this Court's precedent. Pet. 33-34. Moore's persistent and meritorious enforcement of his constitutional rights should weigh *against the state that deprived him of his rights*, not against the victim of the constitutional violations.

Texas, at bottom, contends that Moore's Petition presents a "frivolous" argument that "makes 'a mockery of our system of justice.'" Opp'n 25 (citation omitted). The Court should grant review and make clear that the real "mockery of our system of justice" is the State's decision to force Moore to languish in prison, in highly isolated confinement, with the specter of death ever present.

CONCLUSION

The petition for a writ of certiorari should be granted.

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